STATE OF MICHIGAN

COURT OF APPEALS

In re Parole of BRIAN LEE TODD.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

v

PAROLE BOARD,

Appellant.

UNPUBLISHED
August 25, 2011

No. 299967
Lapeer Circuit Court
LC No. 97-005999-FC

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

The Michigan Parole Board appeals by leave granted from an order reversing its decision to grant parole to defendant Brian Lee Todd. We affirm.

Defendant pleaded no contest to first-degree criminal sexual conduct involving his then five-year-old stepdaughter, who, in fact, he sexually molested dozens of times between 1995 and 1997. On February 3, 1997, he was sentenced to fourteen to thirty years' imprisonment. There is no dispute that, while incarcerated, defendant was essentially a "model prisoner." He took advantage of various programs available to him and meaningfully participated in therapy, reportedly making good progress. Defendant was first considered for parole in 2008, at which time he was denied, the Parole Board noting that defendant showed "no empathy or remorse." He was again considered for parole a year later. On May 29, 2009, the Parole Board approved his parole, subject to a number of conditions, including GPS monitoring.

The prosecutor appealed that decision to the circuit court, arguing that the Parole Board had not obtained a psychological or psychiatric evaluation as required.[1] The circuit court stayed the parole and remanded the matter to the Parole Board, presumably pursuant to MCR

[1] Pursuant to 1996 AC, R 791.7715(5)(b), "A prisoner being considered for parole shall receive psychological or psychiatric evaluation before the release decision is made if the prisoner has a history of any of . . . Predatory or assaultive sexual offenses."

7.10(D)(7), to obtain a psychological evaluation of defendant by a licensed psychologist and/or psychiatrist, and also to explain with greater specificity why it had granted parole.

On remand, William Sarasin, a limited licensed psychologist with a master's degree in social work, conducted an evaluation of defendant. Sarasin's report entailed a review of defendant's record and a personal interview of defendant. Sarasin observed that defendant's diagnosis was pedophilia, and opined that defendant had gained insight into the "distorting effect" of his own abusive childhood on his thoughts and behaviors. Sarasin's report was submitted to the circuit court with affidavits from two Parole Board members who had voted to approve defendant's parole. The affidavits recited as grounds for granting parole defendant's expressed remorse and insight, his good work and education reports, his lack of any misconducts within ten years, his completion of self-help programs, his completion of his minimum sentence,[2] and his low to moderate risk scores.

The circuit court and the prosecutor remained concerned. The prosecutor observed that the Parole Board had not addressed defendant's diagnosis as a pedophile. The circuit court found Sarasin's evaluation "totally inadequate," in part because the report did not reflect any psychological testing, and contained an inaccurate reference to defendant as "Mr. Scott." The trial court also noted that defendant had not served his minimum sentence; one of the affidavits stated that it relied on the psychological report, which was not completed until after the Parole Board's decision was made; defendant had received no further sex offender therapy since 2008; defendant's COMPAS[3] assessment featured several high-risk scores, and defendant's VASOR[4] assessment was only a moderate risk. The circuit court reversed the grant of parole.

Pursuant to MCL 791.233(1)(a), the Parole Board must have "reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." So although the Parole Board has a great deal of discretion, and reviewing courts may not substitute their judgment for that of the Parole Board, its discretion operates within statutorily mandated guidelines. *Killebrew v Dep't of Corrections*, 237 Mich App 650, 652-654; 604 NW2d 696 (1999). Nonetheless, our review is either for a violation of a legal requirement or for a clear abuse of discretion. MCR 7.104(D)(5). The latter is an extremely deferential standard: no matter how unwise we might believe a decision to be, we cannot interfere with the Parole Board's decision unless the petitioner challenging that decision has demonstrated that "an unprejudiced person, considering the facts on which the decisionmaker acted, would say there is no justification or excuse for the ruling." *In re Parole of Glover*, 241 Mich App 127, 129; 614 NW2d 714 (2000).

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[2] As the trial court observed, defendant had *not* served his minimum sentence of fourteen years. However, it appears that defendant had received most, if not all, of the disciplinary credit to which he could have been entitled, thereby making him potentially eligible for parole. See MCL 791.234(1); MCL 791.223b(w); MCL 800.33(5).

[3] Correctional Offender Management Profiling for Alternative Sanctions.

[4] Vermont Assessment of Sex Offender Risk.

Initially, we share the circuit court's concerns about the need for a truly meaningful psychological or psychiatric evaluation to be performed here. Pursuant to 1996 AC, R 791.7715(5)(b), "A prisoner being considered for parole shall receive psychological or psychiatric evaluation before the release decision is made if the prisoner has a history of any of . . . Predatory or assaultive sexual offenses." It is axiomatic that a power or right must be meaningful; consequently, the required evaluation must not be a sham, technicality, or apparently half-hearted effort. Furthermore, to be real, it must be an evaluation *of the prisoner* him- or herself, not merely a reshuffled summary of older documentation. This is hardly an undue burden on the Parole Board or the Department of Corrections. Under 1996 AC, R 791.7715(5) an evaluation is only required where the prisoner has been hospitalized for a mental illness within the past two years, where the prisoner has a history of predatory or assaultive sexual offenses, and where the prisoner has a clear problem with assaultive behavior while incarcerated. Those are circumstances under which society needs to be as certain as possible that a prisoner really is reasonably safe to let out, and under conditions properly tailored to the prisoner's particular challenges and needs.

We conclude that it is within the courts' purview under MCR 7.104(D)(5)(a) to analyze the psychological or psychiatric evaluation performed under 1996 AC, R 791.7715(5)(b) to ensure that it was a meaningful one. But here, we do not agree with the trial court that the evaluation here was a sham. The report contains numerous correct references to defendant's name, and the one mistaken reference is neither substantive nor indicative of an apathetic or incompetent examiner. The evaluation entailed a review of defendant's history and old paperwork, but it would not be sound practice for an examiner not to familiarize her- or himself with an examinee's background to the extent reasonably possible. While we have some concerns that the report appears to take defendant's interview strictly at face value without at least mentioning some consideration of defendant's veracity (or possible lack thereof) during the interview, it is *always* possible to say that an evaluation could conceivably have been more thorough. We are not persuaded that it was conducted as a mere technical formality.

Nonetheless, we conclude that the trial court correctly determined that the Parole Board clearly abused its discretion by relying heavily on defendant's good institutional conduct and on defendant's family support. As to the latter, it is painfully apparent from defendant's revelations during his therapy that, while it certainly does not in any way excuse his behavior, his own abuse at the hands of his family goes some way toward explaining it. Certainly, defendant's psychological evaluation indicated that defendant's family was significantly to blame for perverting defendant's perceptions and reasoning. The trial court correctly pointed out that defendant's COMPAS assessment notes, in what we take as something of an understatement, that he should minimize contact with his family upon release. In light of defendant's family history, there is absolutely no justification whatsoever for the Parole Board to conclude that the availability of support from that family favors granting him parole.

As to the former, we emphasize that it speaks highly of defendant in a general sense that he comported himself with propriety while incarcerated, and he availed himself of a considerable amount of self-help programming. We do not wish to minimize that; indeed, it is commendable. However, unfair though it might seem, good institutional conduct and participation in programming is not necessarily probative of whether a prisoner would be a menace to society or to the public safety upon release. Under the circumstances, it is not. His exemplary conduct *in a*

highly controlled environment free from his own personal temptations simply does not reflect how he might comport himself in "the real world." If he had been imprisoned for a classically violent offense or one that was in some way related to poor anger management, such conduct *would* be probative. But defendant was simply never thought to be the sort of person who would, say, get into fights, drugs, or anything other negative activity that would be realistically possible in prison.

The Parole Board is required by statute to consider defendant's institutional conduct. MCL 791.233e(2)(c). And again, poor institutional conduct would always be probative. But the list of considerations in MCL 791.233e is not exclusive, and under the circumstances, there was no justification for the weight the Parole Board gave to that particular factor.

The disproportionate weight given by the Parole Board to these two factors might not necessarily undermine its ultimate decision to grant parole if that grant could otherwise be supported. We note that Sarasin's report does not actually recommend a disposition. However, defendant's VASOR assessment showed him to be a moderate, rather than low or no, risk for recidivism. Defendant was consistently shown to have poor mental health on other assessments. Ultimately, while we disagree with the trial court's assessment of defendant's psychological examination, we agree that, under the circumstances, the Parole Board abused its discretion by granting defendant parole.

Affirmed.

/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause